1. Introduction

This chapter focuses on the issues which have been raised regarding the implementation of Directive 2004/38 in the light of access to social assistance benefits for EU citizens in other Member States. This Directive regulates the entry and residence of EU citizens and their family members in another Member State.

Directive 2004/38 makes a distinction between residence up to three months, residence from three months to five years and residence for longer than five years. Different preconditions for residence apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. For each category there are different rules regarding access to social assistance benefits.¹

The Directive gives all EU citizens a right to entry to any EU state without any conditions or formalities other than the requirement to hold a valid identity card or passport for three months (Article 6). It is, however, explicitly stated in Article 24(2) that the host Member State shall not be obliged to confer any entitlement to social assistance during these first three months of residence.

According to Article 7(1) Directive 2004/38 Union citizens only have the right of residence on the territory of another Member State for a period of longer than three months if they (as far as relevant for this chapter):

a) are workers or self-employed persons in the host Member State; or
b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State

during their period of residence and have comprehensive sickness insurance cover in the host Member State.²

Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there.³ This means that after five years, a right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover.

2. Entitlement to Social Assistance Benefits?

A big problem is the ambiguity of the wording of Directive 2004/38 regarding entitlement to social assistance benefits. On the one hand the Directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand does it include all kinds of signals that when these inactive persons apply for a social assistance benefit, this should be granted and this will not mean automatic expulsion of these inactive EU citizens.

Lenaerts and Heremans have spoken in this context of a balancing act between the interest awarding social rights as a consequence of the right of free movement against the interest of safeguarding the national welfare systems.⁴

Articles 14(1) and (2) of Directive 2004/38 regulate the retention of the right of residence.

On the basis of Article 14(1) ‘Union citizens and their family members shall have the right of residence provided for in Article 6 (right of residence up to three months), as long as they do not become an unreasonable burden on the social assistance system of the host Member State’. Article 14(2) reads: ‘Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein’.

This wording seems to imply that an appeal to social assistance will lead to an ending of the right of residence for those inactive persons who stay in another Member State for less than five years. But this is not the case, because according to Article 14(3):

² There is a section c) regarding students I will not deal with here.